

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B142

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDWARD HANAM,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,

UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Hearing was held on June 20 and August 14, 2000, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Thomas R. Trager, Associate University Counsel. Complainant appeared in person and was represented by John R. Palermo, Attorney at Law.

Complainant went forward with the evidence, testifying in his own behalf and calling as witnesses Jane Jenkins, Human Resources Manager, and Francis Robinson, Manager of Dental Services.

Respondent called the following witnesses: Rodolpho Martinez-Landin, Chief Financial Officer; David J. Cooke, former Interim Director of Wardenburg Health Center; and Robert A. Cranny, Interim Director of Wardenburg Health Center.

Respondent=s Exhibits 1 through 25, 8.1, 8.2, 8.3, 11.1 and 16.1 were stipulated into evidence. Complainant=s Exhibits B, E, F, G,

H, I, M, N, O, P and Q were admitted without objection. Exhibit L was admitted over objection.

A witness sequestration order was entered, excepting complainant and respondent=s advisory witness, Robert Cranny.

MATTER APPEALED

Complainant appeals the abolishment of his position. For the reasons set forth herein, respondent=s action is affirmed.

ISSUE

Whether respondent=s action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Edward J. Hanam, was employed as Materials Manager for the Wardenburg Health Center of the University of Colorado at Boulder for seven years before his layoff, which was effective June 30, 2000. (Ex. 23.) His duties included purchasing, contracting, inventory control and the supervision of two employees.

2. Hanam did not get along with Rudy Martinez-Landin, the Chief Financial Officer of Wardenburg. On May 25, 1999, the two of them had a confrontation in the hall, during which Landin falsely accused Hanam of misusing a University long-distance telephone call card, and Hanam accused Landin of inappropriately handling purchase orders. Upset, Hanam went to Director David Cooke and asked that

the matter be investigated so that he would be exonerated of any wrongdoing.

3. On June 16, 1999, Cooke held a Rule R-6-10 meeting with Landin to discuss the May 25 incident in which Landin accused Hanam of misusing the University phone card. (Ex. P.)

4. Cooke concluded that Hanam and Landin did not get along with each other, and that they were mutually culpable in their dispute. He took no action against Landin. Hanam would later allege that he was retaliated against during the layoff process for his dispute with Landin.

5. Cooke was the Interim Director of Wardenburg Health Center from March through December 1999. He was hired to find solutions to Wardenburg=s financial problems, which had been ongoing for the past several years. Wardenburg=s budgetary woes were the result of declining patient numbers and the consequent shortfall of revenues, while operating expenses and health care costs rose. Since the largest operating expense was personnel, Cooke knew that there would have to be a number of layoffs.

6. On July 1, 1999, Cooke issued AOptions for the Future,≅ a six-page document setting out the issues, causes and potential solutions, including five options. The report was circulated throughout the organization, including the distribution of copies to the Vice Chancellor and the Student Health Board. Option #3, reorganization of the operations of Wardenburg, was unanimously recommended by those who reviewed the document. (Ex. 5.)

7. On September 15, 1999, Cooke issued two documents: AReorganization Plan≅ and AOperational Plan.≅ (Ex. 6, Ex. 7.) The

reorganization plan was discussed in staff meetings and was posted throughout Wardenburg wherever there was a bulletin board.

8. The purpose of the reorganization was to cut costs. The budget needed to be reduced by \$800,000, which was consistent with option #3, reorganization.

9. Cooke considered abolishing Hanam=s position as early as May 1999. In his experience, he knew of a situation where more of the same type of work as Hanam was responsible for was performed by one person, rather than three. He felt that Hanam=s position was unnecessary, and that other managers could take up the slack, should Hanam=s position be abolished.

10. The first phase of layoffs took effect in November. Cooke anticipated that more layoffs would follow.

11. Final approval of the Wardenburg budget required that the proposed budget be submitted to the Student Health Board, then to the Student Finance Board, and then to the Student Union. All three groups approved the budget cuts. The respective boards do not make position-specific decisions, only those decisions relative to the overall budget plan.

12. Cooke held a meeting with each department manager to discuss potential cuts in particular areas. Landin, as finance officer, attended the meetings, but he did not make recommendations as to which positions should be abolished. All persons were aware that the reorganization resulted from a lack of funds.

13. The budget meeting with Hanam, the manager of receiving and central supply, was held on December 10, 1999. Cooke stated at the

meeting that he thought Hanam=s area was overstaffed. Hanam stressed the importance of the other two positions, indicating that his position was the only one that could be eliminated without harming the department. He seemed willing to be the one who got laid off, telling Cooke that the University had a program for employees who came forward and suggested that their own positions be abolished. Not having heard of such a program, Cooke asked Hanam to find out the details and let him know. Hanam did not bring up the subject again.

14. Following the December 10 meeting, Hanam went to see his friend Bob Cranny, who was Manager of the Department of Physical Therapy. He told Cranny that he had just given up his position at Wardenburg and that he had wanted to leave Wardenburg for a long time. Over the previous two to three years, Hanam had confided to Cranny, from time to time, that he wanted to get out of Wardenburg.

15. The plan called for reorganizing Wardenburg over a period of eighteen months under three Associate Directors. Cooke knew that, because of budgetary considerations, it would not be possible to fill all three Associate Director positions at once.

16. Cooke resigned at the end of December 1999 to accept a position out-of-state. Bob Cranny was named Interim Director to replace him. Cooke was retained as a consultant to assist Cranny in continuing with the budget plan, and communicated with Cranny by telephone.

17. On February 16, 2000, Cranny met with Hanam to advise him that, under the current budget plan, his position would be abolished, but the budget plan was not yet final. Hanam responded: AOkay.= He informed Cranny of his disagreements with Rudy Landin

and gave Cranny a memo saying that the issues remain unresolved. (Exs. E and 17.) He did not ask Cranny to do anything about that situation, but was just letting him know about it.

18. For purposes of the budget, Cranny relied on Hanam=s offer to give up his position, as well as Cooke=s recommendation that Hanam=s position be abolished. Hanam=s annual salary was approximately \$50, 000.

19. On March 29, 2000, Hanam met with Cranny and asked, in an elevated voice, to be informed of the exact status of his position. He alleged that his layoff was the result of retaliation, saying that Landin had been trying to get rid of him for years. Cranny was surprised at Hanam=s display of anger, since they had had a series of meetings since February 16 and Hanam had not alluded to Rudy Landin or retaliation.

20. Cranny checked into Hanam=s allegations of retaliation by looking at files and talking to a few people; he concluded that there was a difference of personalities and opinions between Hanam and Landin, but there was no substance to the charge of retaliation in the layoff process. Rudy Landin had not advised Cranny on particular positions to abolish, and Cranny had not sought such advice from Landin.

21. Under Cranny=s direction, Wardenburg=s budget followed the reorganization and operational plans. (Ex.6, Ex.7.) The time frame for the accomplishment of these objectives was eighteen months.

22. The position of Associate Director of Community Outreach, one of the three Associate Directors pursuant to the reorganization

plan, was allocated \$75,000 in the FY 2000 budget. Cranny is certain that one of the Associate Director positions will be filled this year.

23. During the reorganization, the nursing staff has been increased. A Cold care clinic was instituted so students with minor illnesses could be treated by nurses rather than high-level physicians. One of two dentist positions was eliminated. The Chief of Staff position was abolished. Other changes are in progress, including the installation of a new computer system and the implementation of a different student health insurance policy.

24. Hanam's former duties have been divided up among three people.

25. By letter dated April 28, 2000, Cranny advised Hanam that Hanam's position of Materials Supervisor would be abolished effective June 30, 2000, due to a reorganization. (Exs. 21 and B.)

26. A total of nineteen Wardenburg employees were laid off.

27. Complainant Edward Hanam filed a timely appeal of his layoff on May 8, 2000.

DISCUSSION

In this administrative action, unlike in a disciplinary proceeding, the complainant bears the burden of going forward with the evidence and proving by a preponderance of the evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo.

1991). See also *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent=s decision only if the decision is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. It is for the administrative law judge, as the finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P. 2d 27 (Colo. 1987).

Rule R-7-8, 4 Code Colo. Reg. 801, provides in pertinent part:

The only reasons for layoff are lack of funds, lack of work, or reorganization. Layoffs may result from reorganization which represents a change in the fundamental structure, positions, and/or functions accountable to one or more appointing authorities. A business plan documenting the reorganization shall be posted in a conspicuous place before the first layoff notice is issued. This plan must include an organizational chart, the reasons for the change, the anticipated benefits and results, and, at least in general terms, the expected changes and their effects on employees.

Complainant contends that his layoff was arbitrary, capricious or contrary to rule or law because the notice letter stated that his position was being abolished Aduo to reorganization,≡ but the reorganization plan was not carried out, noting that the Associate Director positions have not been filled. According to complainant, people were laid off without making a change in the fundamental structure of the organization. Denying that he offered to be the one in his area who got laid off, complainant argues that respondent=s action was arbitrary and capricious because nobody

gave a good reason for laying him off, as opposed to laying off anyone else. Additionally, complainant asserts that his position was abolished in retaliation for his dispute with the Chief Financial Officer, Rudy Martinez-Landin.

While the notice letter stated that complainant=s layoff was due to reorganization and did not reference A lack of funds,≅ it is undisputed that the reorganization was the agency=s response to a revenue shortfall. Complainant does not deny, and cannot deny, that a lack of funds was the motivator that caused the layoffs. The reorganization plan was created to improve the efficiency of Wardenburg=s operations in order to reduce costs, and fundamental changes were made in the process. As to the Associate Director positions, a structural change, the evidence is clear that respondent=s intent as to this part of the plan is to implement it over time, with due consideration to the budget. Thus, complainant=s argument in this regard is not persuasive. There is no credible evidence that the agency committed any procedural irregularities. The layoffs could have been justified for lack of funds without calling it a reorganization. Nonetheless, the reorganization plan was properly carried out as a systematic way of facilitating the layoffs.

Complainant asserts that he did not volunteer to get laid off, but simply A offered a scenario≅ of what it would be like if he did get laid off. His testimony, which was contrary to the credible testimony of Cooke, Cranny and Landin, was delivered deliberately, as if rehearsed. I conclude, therefore, that complainant did more than A offer a scenario;≅ he offered his position. At some point, for some reason, he questioned his decision and made the determination to allege that Landin was the reason the layoff

decision was made. With due consideration for the needs of Wardenburg Health Center, and upon Cooke=s recommendation, Cranny made the final decision to abolish complainant=s position and save his \$50,000 salary. There is no agency abuse of discretion here.

The reasoning of *Hughes v. Department of Higher Education*, 934 P.2d 891 (Colo. App. 1997) (Ruland, J., dissenting), is applicable. In *Hughes*, the ALJ was affirmed by the Board in finding the action of the University of Colorado in a layoff to be arbitrary and capricious because the University had not considered several significant issues, particularly complainant=s individual job performance and unique qualifications. In reversing the decision of the ALJ and the Board, the court said:

The decisions the University had to make involved not only matters of budget and administration but also matters of services and future goals. At their core, these matters consist of a multitude of policy considerations, including the University=s mission and core values, its program priorities and focus, and the initiatives it hopes to emphasize in its future development. The factors to consider and the weight or priority to be given any particular factor is for the University to determine. With regard to matters of this nature, the University possesses broad discretionary authority to develop and adopt the plans.

The scope of review of agency action of this nature is exhausted *if a rational basis is found for the decision* made or the action taken. (Citation omitted.) It is not within the province of the ALJ, the Board, or this court to operate or second-guess the University in the making of these decisions which are based on intertwined, and conflicting, policy grounds. *The fact that the ALJ, the Board, or this court may disagree with the decision, or conclude that the University failed to consider adequately all appropriate circumstances, does not deny the decision a rational basis.*

934 P.2d at 895-96 (emphasis supplied).

In the present matter, as in *Hughes, supra*, there was a rational basis for the decision made.

In addition to the above, there is a dearth of evidence pointing to Martinez-Landin as the reason for abolishing Hanam=s position. The evidence suggests that the only person who felt that the dispute between Hanam and Landin was not settled was Hanam, himself. Believing that Landin should have been disciplined, he would not let it go. Yet, at hearing, complainant failed to carry his burden to demonstrate by preponderant evidence that his layoff was retaliatory or procedurally defective in any way.

Factors used in judging the credibility of a witness include the following:

- a) Means of knowledge.
- b) Recollection/eyewitness identification.
- c) Manner of testifying.
- d) Corroboration.
- e) Hostility.
- f) Character/moral turpitude.
- g) Motive, interest and bias.
- h) Inconsistent statements.
- I) Improbability of testimony.
- j) Prior inconsistent statements/contradiction.
- k) Mental incapacity.
- l) Inappropriate expertise/testimony too pat or flawless.

Implementing the above factors, I find that each of respondent=s witnesses testified credibly. All presented no motive for bias or

a hint of dishonesty, and the testimony was internally and externally consistent. Complainant=s testimony was uncorroborated, self-serving, improbable and hostile.

Although complainant may have his own perception of why his position was abolished, along with eighteen others, the evidence is insufficient to establish that respondent=s action was arbitrary, capricious or contrary to rule or law.

This is not a proper case for the award of attorney fees and costs under s. 24-50-125.5 of the State Personnel System Act. See R-8-38, 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

Respondent=s action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent=s action is affirmed. Complainant=s appeal is dismissed with prejudice.

DATED this _____ day of
September, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, #1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

John R. Palermo
Attorney at Law
3333 Quebec Street, #7500
Denver, CO 80207

and in the interagency mail, addressed as follows:

Thomas R. Trager
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